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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10

11 WILLIAM JOHN GREEN,  
12 Petitioner

13 v.

14 JACK FOX, WARDEN,  
15 Respondent.  
16

Case No. CV 15-5420-DMG (GJS)

ORDER DISMISSING PETITION  
FOR WRIT OF HABEAS CORPUS  
WITHOUT PREJUDICE

17 On July 16, 2015, Petitioner, a federal prisoner, filed a 28 U.S.C. § 2241 habeas  
18 petition in this district, which alleges ten claims (“Petition”). Petitioner names as  
19 Respondent the Warden of USP-Lompoc, the federal correctional institution at  
20 which Petitioner is incarcerated. On the same date, Petitioner filed a document  
21 entitled “Additional Motions In Re: Habeas Corpus Petition (28 USC 2241),”  
22 which seeks ten categories of relief (“Motion”).  
23

24 **BACKGROUND**

25 In February 2013, in the United States District Court for the Southern District of  
26 California and pursuant to a plea agreement, Petitioner was convicted of a violation  
27 of 18 U.S.C. § 2252(a)(4)(B) (the “Conviction”). In December 2013, Petitioner was  
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1 sentenced to 87 months in federal prison. (*See* Docket entries 125 and 128 in Case.  
2 No. 11-cr-938-JM.)<sup>1</sup>

3 Petitioner did not appeal his Conviction, and he has not filed a 28 U.S.C. § 2255  
4 motion with respect to the Conviction. In October 2014, Petitioner filed a motion  
5 seeking an extension of time to file a Section 2255 motion, which the Southern  
6 District denied. Petitioner has appealed that denial. (*See* Docket entries 158, 161,  
7 and 168 in Case No. 11-cr-938-JM.)

### 8 9 **THE PETITION AND THE MOTION**

10 The Petitioner alleges the following ten grounds for relief:

11 *Ground One:* Petitioner alleges that since 2012 -- while he has been incarcerated  
12 at the MCC in San Diego (2012-2013), FCC-Seagoville in Texas (2014), and FCI-  
13 Lompoc (2015) -- the Federal Bureau of Prisons (“BOP”) has denied Petitioner  
14 access to a Christian Science Practitioner and, thus, deprived Petitioner of his right  
15 to the free exercise of his religion.

16 *Ground Two:* Petitioner alleges that since 2012, the BOP has denied him  
17 adequate, effective, responsive, and timely medical, dental, and psychological care.

18 *Ground Three:* Petitioner alleges that while he was incarcerated in the SHU at  
19 FCC-Seagoville and in the SHU at FCI-Lompoc, he was denied access to the law  
20 library and legal property, which has impaired his access to courts and ability to file  
21 administrative grievances. Petitioner further alleges that he has not been given  
22 complete copies of medical records he has paid for and that staff at his prior and  
23 present prisons have refused to make timely copies of documents and forms and to  
24 timely file his grievances.

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27 <sup>1</sup> Pursuant to Rule 201 of the Federal Rules of Evidence, the Court has taken  
28 judicial notice of the dockets for the federal district and circuit courts available  
through the PACER system.

1       *Ground Four:* Petitioner alleges that he has been subjected to cruel and unusual  
2 punishment while incarcerated in the SHU at FCC-Seagoville and the SHU at FCI-  
3 Lompoc, because he has been deprived of sanitation items, clean clothes and  
4 bedding, and has been housed next to loud, threatening and insane inmates. In  
5 retaliation for Petitioner's complaints, prison staff at one or both prisons seized  
6 Petitioner's religious property and deprived him of access to the law library and  
7 legal property.

8       *Ground Five:* Petitioner contends that, in January 2014 and January 2015, he  
9 was subjected to cross-country transfers between prisons in violation of BOP policy,  
10 which forbids routine, long transfers for seriously ill inmates. During these  
11 transfers, BOP staff refused to let Petitioner use an assigned wheelchair and made  
12 him climb stairs in violation of medical orders, which caused him to suffer serious  
13 heart trouble and internal bleeding.

14       *Ground Six:* Petitioner alleges that, on five unspecified occasions, BOP staff  
15 members falsely accused and convicted him of matters of which he is innocent,  
16 which resulted in a loss of 95 days of good conduct credits and a year and a half of  
17 various privileges. Petitioner alleges that he initially appealed these convictions but  
18 "abandoned" his appeals as "futile."

19       *Ground Seven:* Petitioner alleges that on three occasions, FCI-Lompoc officers  
20 utilized excessive force and restraints, which injured Petitioner's shoulder and hand  
21 and caused internal bleeding.

22       *Ground Eight:* Petitioner alleges that at both FCC-Seagoville and FCI-Lompoc,  
23 BOP staff members have refused to allow him to use his assigned wheelchair on  
24 unspecified occasions, which forced him to walk and caused him to suffer internal  
25 bleeding, pain, and disability.

26       *Ground Nine:* Petitioner alleges that, while he was incarcerated at FCC-  
27 Seagoville, in June and November 2014, prison officials failed to heed Petitioner's  
28 pleas for protection, and Petitioner was assaulted by inmates. Petitioner further

1 alleges that, in 2015, FCI-Lompoc staff refused to protect him from violent sex  
2 offender inmates, and Petitioner was sexually harassed by a violent pedophile.

3 *Ground Ten:* Petitioner contends that, based upon records and information he  
4 obtained in mid-to-late 2014, he is actually innocent of the crime of which he was  
5 convicted. Petitioner contends that this “newly discovered evidence” shows that he  
6 could not have formed the mens rea for his crime, because he was mentally  
7 incapacitated by reason of brain trauma, chemotherapy poisoning, mental illness,  
8 and the effects of multiple prescription medications.

9 As habeas relief, Petitioner seeks: the expungement of “illegal false”  
10 disciplinary actions and sanctions; immediate release from prison so that he may  
11 receive Christian Science treatment and nursing care; an order overturning the  
12 Conviction and allowing Petitioner to withdraw his plea; the dismissal of criminal  
13 charges; expedited adjudication; and the appointment of counsel.

14 The Motion contains ten sub-motions, labeled M-1 through M-10. M-1 asks the  
15 Court to construe Petitioner’s submissions liberally and to “give him benefit of  
16 doubt” on credibility matters. M-2 asks the Court to waive the Local Rules and any  
17 other rules that otherwise would apply to this case. M-3 asks the Court to grant  
18 Petitioner in forma pauperis status. M-4 asks that Petitioner be excused from his  
19 Fed. R. Civ. P. 5 obligation to serve Respondent with any and all filings. M-5 asks  
20 the Court to grant Petitioner leave on a liberal basis to amend, supplement, correct  
21 and/or revise his filings. M-6 asks for “emergency expedited adjudication.” M-7  
22 asks for an “emergency expedited evidentiary hearing.” M-8 asks that this case not  
23 be transferred to another district. M-9 asks that counsel be appointed for Petitioner.  
24 Finally, M-10 asks that the Court order the BOP to transfer Petitioner to FCI-  
25 Terminal Island and prohibit the BOP from transferring Petitioner out of this  
26 district.

## DISCUSSION

Rule 1(b) of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254 (“Habeas Rules”), permits this Court to “apply any or all of these rules” to any habeas petition, even if the petition is not filed pursuant to Section 2254. Rule 4 of the Habeas Rules requires a district court to dismiss a petition, without ordering a responsive pleading, when “it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief.” Habeas Rule 4. For the following reasons, the Court has concluded that, pursuant to Habeas Rule 4, summary dismissal of the Petition, without prejudice, is required. *See Bostic v. Carlson*, 884 F.2d 1267, 1269–70 (9th Cir.1989) (affirming district court’s dismissal of a Section 2241 petition under Habeas Rules 1(b) and 4).

### I. Grounds One Through Five, Six (In Part), and Seven Through Nine Are Not Cognizable Under Section 2241.

With the exception of Ground Ten, and possibly the portion of Ground Six alleging a loss of 95 days of good conduct credits, Petitioner has not challenging his Conviction or sentence, the execution of his sentence, or the fact of his custody or incarceration. Rather, with the above two exceptions, the Petition challenges the conditions of Petitioner’s confinement. In brief, Petitioner complains of a lack of proper medical, dental, and psychological treatment, the failure to allow him access to Christian Science treating personnel, a lack of access to the law library and legal property, unhealthy and difficult conditions in the SHUs at two different prisons, two inter-prison transfers that allegedly violated BOP policy and caused Petitioner injury, excessive force, instances in which he has been precluded from using his wheelchair, retaliatory conduct by prison staff, and a failure to protect him from other inmates.

A habeas corpus petition under 28 U.S.C. § 2241 is the proper vehicle for a

1 federal prisoner's challenge to the execution of his sentence. *See Hernandez v.*  
2 *Campbell*, 204 F.3d 861, 864 (9th Cir. 2000). By contrast, challenges to a prisoner's  
3 conditions of confinement must be brought through a civil rights action, rather than  
4 through a habeas corpus petition. *See Badea v. Cox*, 931 F.2d 573, 574 (9th Cir.  
5 1991); *see also Docken v. Chase*, 393 F.3d 1024, 1026 (9th Cir. 2004)  
6 ("Traditionally, challenges to prison conditions have been cognizable only via §  
7 1983, while challenges implicating the fact or duration of confinement must be  
8 brought through a habeas petition."). A civil rights action is the "proper remedy"  
9 for a prisoner "who is making a constitutional challenge to the conditions of his  
10 prison life, but not to the fact or length of his custody." *Preiser v. Rodriguez*, 93 S.  
11 Ct. 1827, 1841 (1973). "[C]onstitutional claims that merely challenge the  
12 conditions of a prisoner's confinement, whether the inmate seeks monetary or  
13 injunctive relief, fall outside of that core [of habeas relief] and may be brought  
14 pursuant to § 1983 in the first instance." *Nelson v. Campbell*, 124 S. Ct. 2117, 2122  
15 (2004).

16 Through Grounds One through Five, Seven through Nine, and the portion of  
17 Ground Six related to the loss of privileges, Petitioner seeks to pursue civil rights  
18 claims based on conditions of his confinement that are alleged to violate the First,  
19 Fifth, and Eighth Amendments. These nine claims do not implicate the fact or  
20 duration of Petitioner's confinement, and thus, they are not cognizable under  
21 Section 2241. Instead, Grounds One through Five, Seven through Nine, and the  
22 portion of Ground Six related to the loss of privileges must be raised by way of a  
23 civil rights complaint,<sup>2</sup> rather than through a habeas petition brought under Section  
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27 <sup>2</sup> Because Petitioner challenges the actions of federal employees, his civil rights  
28 claims must be raised under *Bivens v. Six Unknown Named Agents*, 91 S. Ct. 1999  
(1971), rather than 42 U.S.C. § 1983, which applies only to state action.

2241.

The Court may construe a flawed habeas petition as a civil rights action. *See Wilwording v. Swenson*, 92 S. Ct. 407, 409 (1971). Converting the Petition to a *Bivens* complaint would be improper, however, given that: (1) the majority of Petitioner's claims stem from acts and omissions alleged to have occurred at FCC-Seagoville in Texas and, to a lesser extent, an institution in San Diego -- *i.e.*, prior to January 2015, when Petitioner was transferred to FCI-Lompoc -- and thus, this district is not the proper venue for such claims; (2) the Petition was not accompanied by the \$400 filing fee; (3) the Petition was not accompanied by a certified trust account statement covering the past six months as required by 28 U.S.C. § 1915(a); (4) the Petition was not accompanied by an authorization by Petitioner to have the \$400 filing fee deducted from his trust account pursuant to 28 U.S.C. § 1915(b)<sup>3</sup>; (5) based on Petitioner's allegations, it appears that he has not exhausted his administrative remedies for most, if not all, of his claims, a prerequisite to filing a civil rights action<sup>4</sup>; (6) no viable *Bivens* claim has been stated against the sole named Respondent or any other person<sup>5</sup>; and (7) Petitioner has not identified the

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<sup>3</sup> Petitioner is a prisoner and, thus, 28 U.S.C. § 1915(b) requires him to pay "the full amount of a filing fee," although he may do so through monthly payments rather than prepaying the entire amount.

<sup>4</sup> 42 U.S.C. § 1997e(a) provides that: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." Section 1997e(a) requires exhaustion "irrespective of the forms of relief sought and offered through administrative avenues." *Booth v. Churner*, 121 S. Ct. 1819, 1825 n.6 (2001).

<sup>5</sup> The Warden of USP-Lompoc is the only named Respondent. The Petition and related Memorandum, however, do not contain any allegations with respect to Respondent Warden, such as what he did or did not do, much less identify what conduct by him violated the First, Fifth, and Eighth Amendments. Rather, the Petition appears to constitute an improper attempt to hold Respondent vicariously liable premised on the doctrine of respondeat superior. *See Ashcroft v. Iqbal*, 129 S.



1 capacity in which Respondent would be sued for purposes of a civil rights claim, a  
2 critical issue for sovereign immunity purposes.<sup>6</sup>

3 In addition, if the Petition were converted to a *Bivens* complaint, Petitioner  
4 would be obligated to pay the \$400 filing fee for such a civil action, either in full up  
5 front or through withdrawals from his prison trust account in accordance with the  
6 availability of funds. See 28 U.S.C. § 1915(b). The dismissal of this action at the  
7 pleading stage would not end Petitioner's obligation to pay that \$400 filing fee.  
8 Further, the Court would be obligated to screen the converted Petition pursuant to  
9 the screening provisions of the Prisoner Litigation Reform Act of 1995. See 28  
10 U.S.C. § 1915A(b); 42 U.S.C. § 1997e(c)(1). As noted above, the allegations of the  
11 Petition do not state a cognizable *Bivens* claim against Respondent or anyone else.  
12 If the converted Petition ultimately were dismissed for failure to state a claim upon  
13 which relief may be granted, that dismissal could count as a "strike" against  
14 Petitioner for purposes of 28 U.S.C. § 1915(g), which provides that a prisoner who  
15 has three "strikes" -- *i.e.*, prior actions dismissed on the grounds that they are  
16 frivolous, malicious, or fail to state a claim upon which relief may be granted -- may  
17 not bring an action or appeal without prepayment of the full filing fee unless "the  
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20 Ct. 1937, 1948 (2009). In addition, Petitioner's attempt to hold the Warden of FCI-  
21 Lompoc liable for events at other prisons and that predated Petitioner's January  
22 2015 transfer to FCI-Lompoc is plainly meritless.

23 In addition, with nominal exceptions, the Petition fails to identify who did  
24 what or failed to act and when and where the acts of complained of occurred. The  
25 Petition's allegations are too vague and conclusory to provide notice under Fed. R.  
26 Civ. P. 8 and to state a claim for relief that is plausible on its face, as required. *See*  
*Iqbal*, 129 S. Ct. at 1499. "A claim has factual plausibility when the plaintiff pleads  
factual content that allows the court to draw the reasonable inference that the  
defendant is liable for the misconduct alleged." *Id.*

27 <sup>6</sup> See, e.g., *Mayben v. Barnes*, 290 F. Supp. 2d 1169, 1173 (E.D. Cal. 2003) ("a  
28 *Bivens* action cannot be brought against a federal employee in his or her official  
capacity because this would be deemed an action against the United States").



1 prisoner is under imminent danger of serious physical injury.” Thus, the Court  
2 believes it is appropriate to dismiss the Petition, without prejudice, so that Petitioner  
3 may determine whether or not he wishes to raise the subject-matter of Grounds One  
4 through Five, Seven through Nine, and the portion of Ground Six related to the loss  
5 of privileges as *Bivens* claims in a properly-submitted civil complaint in the  
6 appropriate venue(s).

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8 **II. Ground Six Must Be Dismissed.**

9 As noted above, the portion of Ground Six that relates to disciplinary findings  
10 resulting in a loss of privileges for a year and a half constitutes a conditions of  
11 confinement claim that must be raised as a *Bivens* claim, not in a Section 2241  
12 habeas action, because this alleged loss of privileges does not implicate the length or  
13 execution of Petitioner’s sentence. In contrast, a claim that flawed and/or  
14 unconstitutional disciplinary proceedings resulted in the loss of good time credits  
15 may be cognizable under Section 2241, because this constitutes a challenge to the  
16 duration of confinement. *See Preiser*, 93 S. Ct. at 1841; *see also Wolff v.*  
17 *McDonnell*, 94 S. Ct. 2963, 2973 (1974). Even if, however, the portion of Ground  
18 Six based upon the loss of 95 days of good conduct credit imposed as discipline may  
19 be cognizable under Section 2241, this portion of Ground Six nonetheless should be  
20 dismissed without prejudice, for two reasons.

21 First, Petitioner does not allege when and where the five disciplinary convictions  
22 at issue in Ground Six occurred. If they were sustained at FCC-Seagoville and/or in  
23 Petitioner’s San Diego institution(s), the Central District of California is not the  
24 proper venue for this portion of Ground Six.

25 Second, even if venue were appropriate for this portion of Ground Six, the claim  
26 is unexhausted. Although Section 2241 does not contain an exhaustion requirement,  
27 for prudential reasons, federal courts require Section 2241 petitioners to exhaust  
28 their administrative remedies prior to seeking habeas relief. *Ward v. Chavez*, 678

1 F.3d 1042, 1045 (9th Cir. 2012); *see also Singh v. Napolitano*, 649 F.3d 899, 900  
2 (9th Cir. 2011) (*per curiam*) (“In order to seek habeas relief under section 2241 . . .  
3 a petitioner must first, ‘as a prudential matter,’ exhaust his or her available  
4 administrative remedies.”) (citation omitted). Requiring a petitioner to exhaust his  
5 administrative remedies aids “judicial review by allowing the appropriate  
6 development of a factual record in an expert forum,” conserves “the court’s time  
7 because of the possibility that the relief applied for may be granted at the  
8 administrative level,” and allows “the administrative agency an opportunity to  
9 correct errors occurring in the course of administrative proceedings.” *Ruviwat v.*  
10 *Smith*, 701 F.2d 844, 845 (9th Cir. 1983) (*per curiam*). Dismissal is appropriate  
11 when a federal prisoner has not exhausted the administrative remedies made  
12 available by the Federal Bureau of Prisons (“BOP”). *Martinez v. Roberts*, 804 F.3d  
13 570, 571 (9th Cir. 1986) (*per curiam*).

14 Petitioner admits that he abandoned his appeals of these disciplinary convictions  
15 “as futile,” and thus, this portion of Ground Six is unexhausted. Petitioner has not,  
16 however, alleged anything that supports his conclusory allegation of futility.  
17 Although “courts have discretion to waive the exhaustion requirement when  
18 prudentially required, this discretion is not unfettered.” *Laing v. Ashcroft*, 370 F.3d  
19 994, 998 (9th Cir. 2004); *see also Murillo v. Mathews*, 588 F.2d 759, 762, n.8 (9th  
20 Cir. 1978) (the “rule requiring exhaustion” “is not lightly to be disregarded”). A  
21 “key consideration” in exercising such discretion is whether “‘relaxation of the  
22 requirement would encourage the deliberate bypass of the administrative scheme.’”  
23 *Laing*, 370 F.3d at 1000. That consideration precludes this Court from finding that  
24 waiving Petitioner’s failure to exhaust his administrative remedies would be  
25 appropriate, given his concession that he was able to file appeals but chose to  
26 abandon them.

27 Accordingly, the portion of Ground Six alleging a loss of good conduct credits  
28 may not be considered.

1        III.    Ground Ten Is Not Cognizable.

2        Ground Ten directly attacks the Conviction, based upon Petitioner's contention  
3        that he could not have formed the mens rea needed for the crime of which he was  
4        convicted.

5        A motion under 28 U.S.C. § 2255 generally is the exclusive post-appeal  
6        mechanism by which a federal prisoner may challenge the legality of his conviction  
7        or sentence. *See Muth v. Fondren*, 676 F.3d 815, 818 (9th Cir. 2012); *Harrison v.*  
8        *Ollison*, 519 F.3d 952, 955 (9th Cir. 2008). A Section 2241 habeas petition may be  
9        filed by a federal prisoner to attack the "execution of his sentence," but not to attack  
10       its validity. *White v. Lambert*, 370 F.3d 1002, 1009 (9th Cir. 2004); *Hernandez*, 204  
11       F.3d at 864; *see also Porter v. Adams*, 244 F.3d 1006, 1007 (9th Cir. 2001) (noting  
12       that Section 2241 is available only to challenge the manner of execution of a  
13       prisoner's federal sentence, not its legality).

14       There is "one exception" to the generally exclusive nature of the Section 2255  
15       remedy for federal prisoners who wish to challenge the validity of their convictions  
16       and/or sentences. *Stephens v. Herrera*, 464 F.3d 895, 897 (9th Cir. 2006). Section  
17       2255 contains a "savings clause" or "escape hatch," which allows a federal prisoner  
18       to seek Section 2241 relief when a Section 2255 motion is "inadequate or ineffective  
19       to test the legality of his detention." *See id.*; *see also Muth*, 676 F.3d at 818;  
20       *Harrison*, 519 F.3d at 956. A finding that Section 2255 is an inadequate or  
21       ineffective remedy constitutes "a narrow exception" to the rule that Section 2255  
22       provides a federal prisoner's exclusive remedy for challenging a conviction and/or  
23       sentence. *United States v. Pirro*, 104 F.3d 297, 299 (9th Cir. 1997); *see also Ivy v.*  
24       *Pontesso*, 328 F.3d 1057, 1069 (9th Cir. 2003). The petitioner bears the burden of  
25       proving the inadequacy or ineffectiveness of the Section 2255 remedy. *See Redfield*  
26       *v. United States*, 315 F.2d 76, 83 (9th Cir. 1963).

27       As the Ninth Circuit observed in *Muth*, the question of whether a petition is  
28       properly brought under Section 2241, rather than Section 2255, has "important

1 implications” due to differing procedural requirements for these two remedies.  
2 *Muth*, 676 F.3d at 818 (discussing the procedural limitations applicable to Section  
3 2255 motions and from which Section 2241 petitions are exempt). The distinction  
4 between Section 2255 motions and Section 2241 petitions impacts not only the type  
5 of relief available and the applicable procedural limitations but also carries a  
6 jurisdictional component. Section 2255 motions must be heard in the federal district  
7 in which the prisoner was convicted and sentenced, while Section 2241 petitions  
8 must be heard in the federal district in which the prisoner is confined. *See id.*;  
9 *Hernandez*, 204 F.3d at 864-65. As a result, a district court faced with a federal  
10 prisoner’s Section 2241 challenge to the legality of his conviction and/or sentence  
11 must first decide, “before proceeding to any other issue,” whether the relief  
12 requested may be sought under Section 2241. *Id.* at 865; *see also Muth*, 676 F.3d at  
13 818 (“Before proceeding to the merits of a § 2241 petition ostensibly brought  
14 pursuant to the ‘escape hatch’ of § 2255, a district court must resolve the threshold  
15 question whether a petition was properly brought under § 2241 or whether the filing  
16 should instead be construed as a § 2255 motion.”).

17 The Ninth Circuit has construed the “inadequate or ineffective” language  
18 narrowly and made clear that it does not serve as a mechanism for either  
19 circumventing the procedural limitations on Section 2255 motions or obtaining a  
20 second chance to present a claim already denied on the merits. *See, e.g., Ivy*, 328  
21 F.3d at 1059; *Loretsen v. Hood*, 223 F.3d 950, 953 (9th Cir. 2000). The Ninth  
22 Circuit has concluded that the Section 2255 remedy qualifies as inadequate or  
23 ineffective only “‘when a petitioner (1) makes a claim of actual innocence, and (2)  
24 has not had an unobstructed procedural shot at presenting that claim.’” *Harrison*,  
25 519 F.3d at 959 (citation omitted); *see also Muth*, 676 F.3d at 819.

26 To establish actual innocence within the meaning of the Section 2255 savings  
27 clause, a petitioner must show, by a preponderance of the evidence, “‘that, in light  
28 of all the evidence, it is more likely than not that no reasonable juror would have

1 convicted him.’’ *Stephens*, 464 F.3d at 898 (citation omitted); *Ivy*, 328 F.3d at  
2 1060; *Lorentsen*, 223 F.3d at 954. Factual innocence, not legal insufficiency, is  
3 required. *Id.* While it is plain that, through Ground Ten, Petitioner contends he is  
4 “innocent,” the Petition, on its own, fails to meet the above standard and further  
5 development of the record would be needed to resolve element (1) of the Ninth  
6 Circuit’s governing test. Such record development is unnecessary, however, because  
7 Petitioner plainly has not satisfied, and cannot satisfy, element (2).

8 Petitioner had an unobstructed procedural shot at raising Ground Ten by filing a  
9 Section 2255 motion in the sentencing court. Petitioner, however, failed to do so.  
10 Petitioner admits, in Ground Ten, that he possessed the documents and information  
11 needed to support the claim in mid-to-late 2014. As formulated, the claim consists  
12 of ten handwritten lines. The Court has reviewed the Southern District’s docket for  
13 Petitioner’s criminal case and it is readily apparent that Petitioner was a vigorous  
14 litigant during 2014, given his numerous filings. There is no apparent reason why  
15 Petitioner could not have handwritten this same brief Ground Ten text on the  
16 Section 2255 motion form available for litigants and filed the form motion in the  
17 sentencing court in a timely manner, especially given his representation to the  
18 Southern District that, as of October 2014, he “possessed sufficient legal resources,  
19 experience and training to file appropriate motions and memoranda” and did not  
20 need the advice of counsel. (*See* Docket entry 158 at p. 5, Case No. 11-cv-938-JM.)  
21 Rather than making the simple effort needed to file such a Section 2255 motion, it  
22 seems that Petitioner, instead, chose to focus his efforts during the last third or so of  
23 his limitations period on motions seeking more time, reconsideration, and recusal.  
24 (*See id.*, e.g., Docket entries 158, 160, 166, 175, and 180.)

25 Petitioner cannot allege truthfully that he has “never had the opportunity to raise”  
26 his Ground Ten claim in a Section 2255 motion. *Ivy*, 328 F.3d at 1060 (“it is not  
27 enough that the petitioner is presently barred from raising his claim of innocence by  
28 motion under § 2255. He must never have had the opportunity to raise it by

1 motion.”). Petitioner has not attempted to raise his Ground Ten claim in the  
2 sentencing court through a Section 2255 motion. Whether or not such a motion  
3 would be cognizable or barred is beside the point; the fact is that he has never  
4 attempted to pursue Section 2255 relief, and thus, there is no basis for finding such  
5 relief to be inadequate and ineffective under these circumstances. *See id.*  
6 Accordingly, Section 2241 jurisdiction over Ground Ten does not exist in this  
7 district based on the Section 2255 escape hatch, and the claim must be dismissed  
8 without prejudice.

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10 IV. The Court Will Not Consider The Motion.

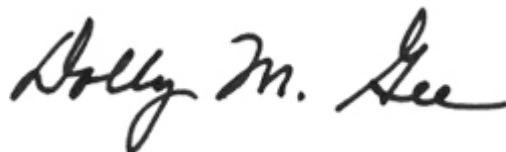
11 As noted above, Petitioner filed the Motion with the Petition, and the Motion  
12 seeks ten categories of relief. Given the Court’s conclusion that it lacks jurisdiction  
13 to consider the claims alleged in the Petition and/or that the claims are not  
14 cognizable, this case will not proceed. As a result, there is no reason for the Court  
15 to consider the Motion and the Court declines to do so.

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19 Accordingly, for the foregoing reasons, IT IS ORDERED that the Petition is  
20 DISMISSED WITHOUT PREJUDICE.

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22 LET JUDGMENT BE ENTERED ACCORDINGLY.

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24 DATED: August 17, 2015



25  
26 DOLLY M. GEE  
27 UNITED STATES DISTRICT JUDGE  
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1 Submitted by:

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4 GAIL J. STANDISH  
5 UNITED STATES MAGISTRATE JUDGE  
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